Supreme Court, U.S.
FILED
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No. 02-266

IN THE

Supreme Court of the United States

PROJECT CONTROL SERVICES, INC., LLC,

Petitioner,

v.

WESTINGHOUSE SAVANNAH RIVER COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should exercise its discretion to review the fact-specific decisions of the District Court and Fourth Circuit that the Petitioner was not an intended third-party beneficiary of a contract between the United States Department of Energy and the Respondent for the management and operation of the United States Nuclear Facility at the Savannah River Site.

PARTIES TO THE PROCEEDING

Respondent

At the time of the filing of this lawsuit, Westinghouse Savannah River Company (WSRC) was a Delaware Corporation with its principal place of business in South Carolina. CBS Corporation was the parent company of WSRC.

In March 1999, Morris Knudsen Corporation purchased WSRC. Thereafter, Westinghouse Savannah River Company, LLC (a Delaware Limited Liability Company) became the successor to the WSRC Delaware Corporation. WSRC, as an LLC, is a wholly-owned subsidiary of Westinghouse Government Services Company, LLC, a Delaware Limited Liability Company, which was formed by Morris Knudsen Corporation.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Cited Authorities	iv
Appendix A	1a
Statement of the Case	1
Response to Mis-Statements of Law and Fact	3
Reasons for Denying the Petition	4
I. There is no conflict between the decisions of the Fourth Circuit and Federal Circuit.	4
II. The decision of the Fourth Circuit is correct.	8
III. There is no important question.	9
IV. The Fourth Circuit's decision does not interfere with any rights conferred by the Small Business Act.	10
Conclusion	11

TABLE OF CITED AUTHORITIES

Page

Cases:

Baudier Marine Electronics v. United States, 6 Cl. Ct. 246 (1984) 7

Montana v. United States, 124 F.3d 1269 (Fed. Cir. 1997) 6, 7

Orchards v. United States, 4 Cl. Ct. 601, *aff'd*, 749 F.2d 1571 (Fed. Cir. 1984), *cert. denied*, 474 U.S. 818 (1985) 6, 7

Parker v. United States Department of Agriculture, 879 F.2d 1362 (6th Cir. 1989) 8

Project Control Services, Inc. v. Reynolds, 545 S.E.2d 593 (Ga. App. 2001) 2

Schuerman v. United States, 30 Fed. Cl. Ct. 420 (1994) 6, 8

Rule:

U.S. Sup. Ct. R. 15.2 3

Other Authority:

13 C.F.R. § 1001(a)(3) 8

STATEMENT OF THE CASE

In 1989, the Respondent (WSRC) entered into a Prime Contract with the United States Department of Energy (DOE) to manage and operate DOE's nuclear facility at the Savannah River Site. The Prime Contract gave WSRC the right to perform the work with its own employees or with subcontractors. It required WSRC to audit subcontractors having reimbursable cost elements in their prices, and it made all related records subject to inspection and audit.

The Prime Contract contemplated the possibility of subcontracting with small businesses. As to Woman-Owned Businesses like the Petitioner (PCS), the contract provided:

> It is the policy of the United States that women-owned small businesses shall have the maximum practicable opportunity to participate in performing contracts awarded by any Federal agency.
>
> The Contractor agrees to use its best efforts to give women-owned small businesses the maximum practicable opportunity to participate in the subcontracts it awards to the fullest extent consistent with the efficient performance of its contract.

The Prime Contract also gave DOE, but no one else, the right to recover liquidated damages from WSRC for failing to make a good faith effort under these provisions. The associated subcontracting plan set goals against which to measure WSRC's good faith efforts in contracting with small woman-owned businesses. It is undisputed that WSRC

always met or exceeded these goals. It is also undisputed that DOE never declared WSRC in default for failure to make a good faith effort in meeting any small business subcontracting goals.

WSRC awarded PCS six subcontracts from 1994 to 1997, some of which had reimbursable cost elements and contained the same inspection and audit rights as the Prime Contract between WSRC and DOE. During a routine, contractually-authorized audit, WSRC questioned some reimbursable costs charged by PCS.

Rather than provide the requested information, PCS stonewalled WSRC and refused to provide the information. When WSRC refused to accept PCS's stonewall tactics, PCS responded with a shotgun blast of allegations and lawsuits. Beginning in September 1998, PCS desperately attempted to divert attention from its failure to cooperate in the audit by waging a war of attrition through litigation in this case and other actions filed in Georgia State Court and Georgia Federal Court based on the same factual allegations.

PCS aggressively pursued the present case, engaging in extensive discovery, repeatedly amending its Complaint, and filing numerous motions. The district court finally declared that this case "has gotten out of control" and imposed discovery restrictions. Only eleven days later, PCS filed a new action against WSRC's employees in Georgia, rehashing many allegations already made in the present case. The Georgia case was dismissed on motion by the defendant employees, and the Georgia Court of Appeals affirmed. *Project Control Services, Inc. v. Reynolds*, 545 S.E.2d 593 (Ga. App. 2001). Although not known to WSRC at the time, PCS had filed a qui tam action in Georgia Federal District

Court, alleging the same claims. After the United States declined to participate, PCS dismissed the qui tam action without prejudice and prior to service of it on WSRC.

The South Carolina District Court action resulted in summary judgment and judgment as a matter of law for WSRC on some claims, and a jury verdict for WSRC on all remaining tort and contract claims. The district court entered judgment for WSRC and later awarded costs to WSRC. The Fourth Circuit affirmed *in toto*.

RESPONSE TO MIS-STATEMENTS OF LAW AND FACT

Pursuant to Supreme Court Rule 15.2, WSRC submits the following responses to inaccuracies in PCS's petition, in addition to the inaccuracies refuted in the Statement of the Case (above) and the Reasons for Denying the Writ (below).

To the extent PCS now attempts to argue that it was a third-party beneficiary under the two-part test that it challenges as incorrect, this issue is not preserved for appeal. PCS did not make this argument to the district court or the Fourth Circuit.

PCS's statement that its "work was excellent as it always completed it work satisfactorily without complaint" is misleading. Its employees performed their tasks. Its management, however, refused to cooperate in the contractually mandated audit. PCS ultimately agreed in September 1998, during the pendency of this lawsuit, to allow the Defense Contract Audit Association (DCAA) to conduct the audit. PCS, however, did not submit auditable proposals until December 1999, and the final audit was not completed until September 8, 2000, just before the commencement of trial on October 10, 2000.

There was no requirement that WSRC's auditors be CPAs or supervised by CPAs. PCS lost this claim in the present case and in the Georgia litigation.

WSRC did not refer PCS for criminal investigation. It advised DOE regarding the questions uncovered by the audit, as required by the Prime Contract and DOE regulations. The DOE Inspector General instructed WSRC to continue to seek answers to those questions. The only expert with government accounting expertise to testify at trial concluded that WSRC's questions and actions were proper.

WSRC did not blacklist PCS. WSRC received judgment on this claim. WSRC did not improperly hire away PCS's employees. WSRC received a verdict on this claim. In fact, the jury determined that WSRC had not breached any subcontract with PCS.

REASONS FOR DENYING THE PETITION

I. There is no conflict between the decisions of the Fourth Circuit and Federal Circuit.

The Fourth Circuit's decision is an unpublished opinion (No. 01-1352). It does not discuss the third-party beneficiary issue or any tests for deciding that issue. Rather, it affirmed the district court's ruling on this issue by twice noting that it affirmed "the final judgment of the district court *in toto*." (Pet, App A at 4a and 16a). The Fourth Circuit also noted in a footnote that it had "carefully reviewed PCS's remaining assignments of error and [found] them to be without merit." (*Id.* at 15a n.7).

The district court's decision is also unpublished. It also does not discuss the third-party beneficiary issue or any tests for deciding that issue. The district court's entire ruling is set forth in a single paragraph:

> The court agrees with the arguments presented by WSRC in its memorandum in support of motion for summary judgment and its reply memorandum as to Count I [the third-party beneficiary claim]. The court concludes that PCS was not an intended beneficiary of the contract between DOE and WSRC. Accordingly, summary judgment is appropriate on Count I.

(Pet, App B at 20a). The district court was correct. In fact, PCS's president and owner admitted that her company was not entitled to subcontracts simply because WSRC had the Prime Contract with DOE. (Pet, App C at 33a n.16).

The Fourth Circuit affirmed the district court *in toto*. Thus, the unpublished decision of the Fourth Circuit, which PCS contends conflicts with the Federal Circuit's law on the issue of third-party beneficiaries, contains no discussion of that issue. It simply affirms the ruling of the district court, which had ruled by agreeing with the arguments set forth in WSRC's memorandum and reply memorandum, including the admission of PCS's president and owner.

WSRC's supporting memorandum opens with a review of federal law for determining whether a claimant is a third-party beneficiary of a federal contract. (Pet, App C at 29a-32a). It cites several cases, including the key cases cited by PSC in its Certiorari Petition:

(1) *Orchards v. United States*, 4 Cl. Ct. 601, *aff'd*, 749 F.2d 1571 (Fed. Cir. 1984), *cert. denied*, 474 U.S. 818 (1985).

(2) *Schuerman v. United States*, 30 Fed. Cl. Ct. 420 (1994).

(3) *Montana v. United States*, 124 F.3d 1269 (Fed. Cir. 1997).

In the next section of the memorandum, entitled "As Applied," WSRC *argued*: "*Applying this precedent*, PCS cannot maintain that it was intended to be a beneficiary of the WSRC and DOE Prime Contract provision regarding small business goals." (Pet, App C at 32a-33a) (emphasis added). The only case specifically cited in this argument section was the Federal Circuit's decision in *Montana*, which is the cornerstone of PCS's arguments before this Court. (*Id.* at 33a). WSRC's reply memorandum did not cite any of the cases relied upon by PCS to demonstrate the existence of a conflict between the Fourth Circuit and Federal Circuit. (*See* Appendix A, *infra*).

Contrary to PCS's assertion, the memorandum and reply memorandum (which are the basis of the decisions by the district court and Fourth Circuit) do not "decide" the case on the basis of the two-part test in *Orchard*. At most, the "decision" was that WSRC was entitled to summary judgment

under both tests, *i.e.*, the Fourth Circuit did not choose between the tests. If a test was chosen, it manifestly was the *Montana* test touted by PCS in its certiorari petition, since that was the only decision cited in the section applying the earlier discussed federal law. Indeed, the only specific ruling by the district court was that "PCS was not an intended beneficiary of the contract between DOE and WSRC." (Pet, App B at 20a). This ruling fits squarely under the *Montana* test touted by PCS, since that is the controlling inquiry under *Montana*.

PCS asserts that the *Montana* court refused to follow the second prong of the test in *Orchard*. PCS is misreading the *Montana* decision. The *Montana* court rejected the second-prong of the two-prong test adopted in *Baudier Marine Electronics v. United States*, 6 Cl. Ct. 246 (1984). See *Montana*, 124 F.3d at 1273. In fact, the *Montana* court cited *Orchard* as an example of when the second-prong of the *Baudier* test would be appropriate. 124 F.3d at 1273 n.6.

In short, the basis for the Fourth Circuit's unpublished decision on the third-party beneficiary issue does not appear in its decision, nor does it appear in the district court's order. It can be found only in WSRC's memorandum and reply memorandum. If a test was chosen, it was the test advocated by PCS, or the Fourth Circuit did not choose between the tests. Thus, there is no conflict between the Fourth Circuit and Federal Circuit. And assuming there is a conflict, a single unpublished opinion that adopts a party's memorandum and reply memorandum is not the stuff of which certiorari is made.

II. The decision of the Fourth Circuit is correct.

PCS's reliance on the decision in *Schuerman* is completely misplaced. *Schuerman* involved a loan guarantee agreement between the Farmers Home Administration (FmHA) and the Production Credit Association (PCA) regarding FmHA's guarantee of a loan by PCA to the plaintiffs. The court found the plaintiffs were a third-party beneficiary of the loan guarantee agreement, because they and their loan were the specific object and purpose of the guarantee agreement. Here, PCS is not mentioned in the WSRC-DOE Prime Contract, nor was PCS the object or purpose of the Prime Contract.

The more salient ruling in *Schuerman* appears in a footnote discussing the decision in *Parker v. United States Department of Agriculture*, 879 F.2d 1362 (6th Cir. 1989). The court distinguished *Parker* and its rejection of a third-party beneficiary claim, because the contract at issue was a general contract concerned with general duties for all contracts issued under a federal loan program and did "not refer to any specific borrower." 30 Fed. Cl. at 434 n.14. That is the same situation here. The WSRC-DOE Prime Contract dealt generally with WSRC's duties in issuing subcontracts under the Prime Contract, but it did not refer to PCS or any other specific subcontractor.

PCS also relies on 13 C.F.R. § 1001(a)(3) and again, its reliance is misplaced. This Small Business Regulation merely gives all small business concerns the right to challenge whether a particular business qualifies as a small business concern. In other words, it gives the right to challenge whether that business should be competing for small business set-aside contracts. It has absolutely nothing to do with the question of whether a small business concern is a third-party beneficiary of any particular government contract.

Finally, PCS misperceives WSRC's duties. WSRC was obligated to DOE to make a good faith effort to provide an opportunity to small woman-owned businesses. It is undisputed that WSRC met or exceeded those goals. Neither the Prime Contract nor the Small Business Act gave any particular small business any right to any subcontract, and PCS's owner and president admitted this. At most, DOE and WSRC were required to provide an opportunity to small businesses. WSRC clearly did this. PCS received six subcontracts from WSRC, all of which expired under their own terms.

III. There is no important question.

The Fourth Circuit's decision is not contrary to the Congressional statement of national policy in the Small Business Act, nor does it thwart the intent of the Act. Nothing in the decision even hints at undermining the policy of providing opportunity to small businesses. The Fourth Circuit's unpublished opinion did not ignore the Federal Circuit pronouncements on third-party beneficiaries of federal contracts. As explained earlier, it either adopted those pronouncements or held that PCS's claim failed under all tests without adopting any particular test. PCS's "venue selection clause" argument, therefore, is manifestly without merit. Moreover, this "venue" argument is not properly preserved, it having never been raised to the district court or the Fourth Circuit.

IV. The Fourth Circuit's decision does not interfere with any rights conferred by the Small Business Act.

This PCS argument is mere hyperbole bottomed on the assumed correctness of its earlier, and incorrect, arguments. Contrary to its assertion before this Court, PCS was not bludgeoned into submission. It sued WSRC in several state and federal court actions. PCS pursued this case for more than two years, culminating in a trial that lasted more than three weeks. It lost this trial. Its demands in this case ranged from $129,000,489 prior to trial to $7,000,000 at trial. It refused an offer of $300,000, which was 25% higher than it ultimately received for post-audit subcontract payments. It now seeks certiorari, which should be denied.

The delay in payment, of which PCS complains, was caused by PCS's refusal to cooperate in the contractually mandated audit. PCS was paid all sums due under the express terms of the subcontract. The "delayed" payments could not be calculated until the completion of the contractually mandated audit. After those issues were resolved, PCS was paid all remaining sums due under the contract except for $33,328, which was withheld pending the district court's decision on WSRC's petition for costs in successfully defending PCS's claims against it. The district court recently awarded WSRC $33,328.70 in costs, and the balance of $547.30 was returned to PCS.

The American Dream is not at issue here, nor is it endangered by the Fourth Circuit's decision. The issue here is the American Nightmare of some people, like PCS's owners, believing that every federal policy statement creates an entitlement program that guarantees them a federal annuity. The policy, however, is one of opportunity, not

entitlement. WSRC was required to provide an opportunity to small businesses. It did so. PCS was given an opportunity but squandered it. This does not warrant a lawsuit, nor does it warrant the consumption of this Court's valuable and limited time and resources.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
AIKEN DIVISION

Civil Action No: 1:98-3738-22

PROJECT CONTROL SERVICES, INC.

Plaintiff,

vs.

WESTINGHOUSE SAVANNAH RIVER COMPANY,

Defendant.

WESTINGHOUSE SAVANNAH RIVER COMPANY'S REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT WESTINGHOUSE SAVANNAH SAVANNAH RIVER COMPANY'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT AS TO ALL CLAIMS

[Filed June 30, 2000]

* * *

[p. 10]

THIRD-PARTY BENEFICIARY: WSRC has met its subcontracting goals under the socioeconomic plan submitted to DOE and received numerous awards for promoting small business opportunities. (Scott pp. 111-112.) PCS also does not dispute that, even if it is an intended beneficiary, its right

to enforce the contract between WSRC and DOE can rise no higher than DOE's rights. PCS does not contend that DOE could have brought a claim against WSRC pursuant to the Prime Contract. Indeed, the Prime Contract provides in Article I-16 that WSRC must pay liquidated damages only if it has willfully or intentionally failed to perform in accordance with the requirements of the subcontracting plan *after* WSRC "has failed to meet its subcontracting goals. . . ."[1] PCS' attempts to distinguish *Maccaferri Gabions, Inc. v. Dynateria, Inc.*, 91 F.3d 1431, 1441 (11th Cir. 1996) but concedes that the putative third-party beneficiary's rights "had not yet accrued. . . ." (Response p. 16.) Likewise, PCS claimed individual rights as a member of a class of alleged intended beneficiaries have not accrued since WSRC met all of its goals as agreed in its Prime Contract with DOE. It simply does not follow that PCS can demand more of WSRC than DOE, a party to the contract.

PCS incorrectly relies on *Sallee v. United States*, 41 Fed. Cl. 509, (1998) for the proposition that since WSRC is not sovereign, it is not entitled to sovereign immunity, deftly refuting a position WSRC has never taken. Plaintiff's third-party beneficiary status was critical to the jurisdictional issue in *Sallee*. "Because Plaintiff lacks privity with the United States, he must present alternative grounds for jurisdiction, such as being a third-party beneficiary to the DOE/WSRC contract." *Id.* At 513. *Sallee* held that contractual documents between WSRC and DOE "could not lead a reasonable person to believe that the DOE/WSRC contract was conferring the

1. *See*, footnote 4 to WSRC's Memorandum in Support of Motion for Summary Judgment as to all Claims, pp.3-4, the particular FAR Section incorporated into the WSRC Prime Contract with DOE.

right upon Plaintiff." *Sallee, supra*, 41 Fed. Cl. at 514. PCS did not rely on the Prime Contract between WSRC and DOE for its business. (A. Peel v.3, pp.85-87.) At best, WSRC's agreement required it to exert its best efforts to meet its subcontracting goals, an obligation which it irrefutably has fulfilled.[2]

PCS incorrectly cites 13 C.F.R. Part 121 as providing an administrative procedure for determining third-party status. (Response p. 22.) This section is entitled "Small Business Size Regulations" and deals with the rules for designating an entity as a small business. It provides administrative remedies for an entity aggrieved by a Small Business Administration determination of small business status. Given the case law and Mrs. Peel's unequivocal testimony that she did not rely on the Prime Contract or small woman owned business status for business from WSRC, the third-party beneficiary claim is not supported in law or in fact.

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2. PCS also insists that WSRC should have done more "counseling" in this situation. Everyone at WSRC advised PCS to cooperate with the audit and substantiate its costs. Even PCS' own consultant admitted that PCS' responses were inadequate and recalled that he may have told PCS officials that they were wrong on certain items but specifically could not recall which ones at the time of his deposition. (Bowland pp.299-300.)